

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





# 77-1238

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*  
vs.

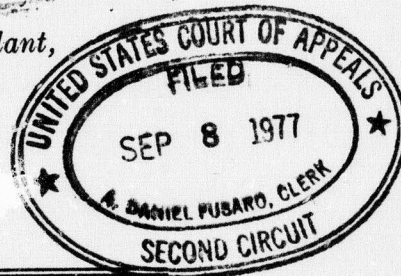
LANI M. BROZYNA,  
*Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NEW YORK.

## BRIEF OF DEFENDANT-APPELLANT

McDONOUGH, BOASBERG, HAMSHER,  
HELLER AND RAMM,  
*Attorneys for Defendant-Appellant,*  
930 Walbridge Building,  
Buffalo, New York 14202.

EDWARD HELLER,  
*of Counsel.*



BATAVIA TIMES, APPELLATE COURT PRINTERS  
A. GERALD KLEPS, REPRESENTATIVE  
20 CENTER ST., BATAVIA, N. Y. 14020  
716-843-0487







# INDEX.

|                                                                                                                                                                                                           | page    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------|
| PRELIMINARY STATEMENT.....                                                                                                                                                                                | 1       |
| STATEMENT OF THE CASE.....                                                                                                                                                                                | 2       |
| POINT I. THE COURT SHOULD HAVE EXERCISED ITS DISCRE-<br>TION TO ORDER A SEPARATE TRIAL OF THE COUNTS OF<br>THE INDICTMENT, AND ITS FAILURE TO DO SO REQUIRES<br>A REVERSAL OF THE CONVICTION THEREON..... | 2       |
| CONCLUSION.....                                                                                                                                                                                           | 7       |
| TABLE OF CASES.                                                                                                                                                                                           |         |
| Alberty v. U.S., 162 U.S. 499, 16 S.Ct. 864, 40 LEd<br>1051 (1896).....                                                                                                                                   | 5       |
| Baker v. U.S., 401 F2d 958 (1968).....                                                                                                                                                                    | 3       |
| Bayless v. U.S., 381 F2d 67 (CA 9, 1967).....                                                                                                                                                             | 4       |
| Boyer v. U.S., App. D.C. 397, 132 F2d 12 (1942).....                                                                                                                                                      | 4       |
| Chambers v. U.S., 112 U.S. App. D.C. 240, 301 F2d 564<br>(1962).....                                                                                                                                      | 3       |
| Drew v. U.S., 331 F2d 35 (1964).....                                                                                                                                                                      | 2,3,4   |
| Dunaway v. U.S., 92 U.S. App. D.C. 299, 205 F2d 23<br>(1953).....                                                                                                                                         | 3,4,6   |
| Fairbanks v. U.S., 96 U.S. App. D.C. 345, 226 F2d<br>251 (1955).....                                                                                                                                      | 4       |
| Langford v. U.S., 106 U.S. App. D.C. 21, 268 F2d 893<br>(1959).....                                                                                                                                       | 6       |
| Martin v. U.S., 75 U.S. App. D.C. 399, 127 F2d 865<br>(1942).....                                                                                                                                         | 4       |
| Miller v. U.S., 116 U.S. App. D.C. 45, 320 F2d 767<br>(1963).....                                                                                                                                         | 5       |
| Peckman v. U.S., 93 U.S. App. D.C. 136, 210 F2d 693<br>(1953).....                                                                                                                                        | 3       |
| Robinson v. U.S., 459 F2d 847 (1972).....                                                                                                                                                                 | 3       |
| Smith v. U.S., 357 F2d 486 (1966).....                                                                                                                                                                    | 2,3,4,6 |



## II.

|                                                       | page |
|-------------------------------------------------------|------|
| U.S. v. Lotsch, 102 F2d 35 (2d Cir) cert denied, 307  |      |
| U.S. 622, 59 S.Ct. 793, 83 L.Ed. 1500 (1939)....      | 6    |
| Vick v. U.S., 216 F2d 228 (5th Cir 1954).....         | 5    |
| Williams v. U.S., 265 F2d 214 (1959).....             | 3,4  |
| Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407, 9 LEd   |      |
| 2d 441 (1962).....                                    | 5    |
| STATUTE.                                              |      |
| Title 18, U.S.C.:                                     |      |
| Section 922a(6).....                                  | 1    |
| Section 924a.....                                     | 1    |
| Section 3150.....                                     | 1    |
| RULES.                                                |      |
| Federal Rules of Criminal Procedure:                  |      |
| Rule 8(a).....                                        | 2,3  |
| Rule 14.....                                          | 3    |
| MISCELLANEOUS.                                        |      |
| 2 Wigmore, Evidence, Sections 300-371 (3ed 1940) .... | 5    |



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

UNITED STATES OF AMERICA

Plaintiff-Appellee

-vs-

LANI M. BROZYNA

Defendant-Appellant

---

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

On September 11, 1974, the defendant was arraigned before the U.S. Magistrate on a complaint charging a violation of Title 18 U.S.C., Section 922a(6), and Title 18 U.S.C., Section 924a, the unlawful acquisition of a firearm by furnishing false identification. In March, 1975, the defendant was indicted on the charges and an additional charge of a violation of Title 18 U.S.C., Section 3150, bail jumping on the initial charge. The defendant was arraigned on April 4, 1975. Thereafter, on June 17, 1975, the defendant moved for, among other things, separate trials of the counts of the Indictment. The motion was denied on



September 29, 1975. The motion for separate trials was renewed at the commencement of trial on August 3, 1976, at the start of the trial and at the close of the People's case. In each instance the application was denied. The jury returned a verdict of guilty on both counts, and the Court, which had reserved decision on the defendant's motion to dismiss Count I of the Indictment, granted said motion after the jury's verdict and denied motions for acquittal on Count II, the bail jumping charge.

#### STATEMENT OF THE CASE

The defendant staked her defense on the theory that the Government would not be able to prove the "acquisition" of a firearm because the proof had early on been conceded to show that the transaction had not come to fruition. As to the bail jumping charge, the only available defense required the defendant to take the witness stand herself in order to explain the motive for her non-appearance. As a consequence, the jury heard considerable testimony with respect to the first count of the Indictment that would not have otherwise been admissible with respect to Count II. It is for that reason that a motion had been made for separate trials, and it is for that reason that the defendant now appeals to this Court for a reversal of her conviction on Count II.

#### POINT I

THE COURT SHOULD HAVE EXERCISED ITS DISCRETION TO ORDER A SEPARATE TRIAL OF THE COUNTS OF THE INDICTMENT, AND ITS FAILURE TO DO SO REQUIRES A REVERSAL OF THE CONVICTION THEREON.

The Federal Rules of Criminal Procedure via Rule 8(a) provides for permissible joinder of offenses in certain specified cases. The justification for this liberal rule of joinder of offenses appears to be the economy of a single trial and expedition in judicial administration. Drew v. U.S., 331 F2d 85, 88 (1964); Smith v. U.S., 357 F2d 486,



489 (1966); Williams v. U.S., 265 F2d 214 (1959). However, Rule 14 F.R.C.P. provides:

If it appears that the defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Thus, even though the joinder is permissible under Rule 8(a), if the defendant makes a timely motion under Rule 14 and shows prejudice, the court should either order an election by the Government or grant separate trials. Dunaway v. U.S., 92 U.S. App. D.C. 299, 300, 205, F2d 23, 24 (1953); Peckman v. U.S., 93 U.S. App. D.C. 136, 140, 210 F2d 693, 697-8 (1953); Chambers v. U.S., 112 U.S. App. D.C. 240, 301 F2d 564 (1962).

The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons:

1. He may become embarrassed or confounded in presenting separate defenses;
2. The jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged;
3. The jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find;
4. A less tangible element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

Robinson v. U.S., 459 F2d 847 (1972); Baker v. U.S., 401 F2d 958, 974 (1968); Drew v. U.S., 118 U.S. App. D.C. 11, 14, 331 F2d 85, 88 (1964).

Therefore, in the consideration of prejudice from joinder, the problem is that of weighing the prejudice to the defendant against the advantage to the administration of justice which is achieved by disposing of two or more closely related issues in one trial.



This weighing is done on a case by case basis. Bayless v. U.S., 381 F2d 67, 72, (CA 9, 1967); Smith v. U.S., 357 F2d 486, 489 (CA 5, 1966); Drew v. U.S., 118 U.S. App. D.C. 11, 14, 331 F2d 85, 88 (1964); Williams v. U.S., 265 F2d 214 (CA 9, 1959).

An application of the four means by which a defendant may be prejudiced by joinder of two or more offenses to the case at bar reveals that the defendant, BROZYNA, was prejudiced to a degree sufficient to require a reversal of Count II conviction. Initially, we can point to the fact that the defendant was confounded in her defense. She did not desire or feel the need to take the stand and testify regarding Count I of the Indictment as it was clear from the outset that the Government could not prove all the elements of the crime alleged. However, there was a great need to have the defendant testify as to her willfulness in the bail jumping charge (Count II). Thus in defending herself from the joined charges, Ms. Brozyna was embarrassed and put in a whip saw position. Dunaway v. U.S., 92 U.S. App. D.C. 299, 205 F2d 23 (1953). If Ms. Brozyna had chosen not to testify, she would have foreclosed her only means of presenting to the jury the circumstances which would prove that she did not willfully jump bail. On the other hand, Ms. Brozyna's testimony on the willfulness issue is going to cause the jury to hear a great deal of testimony which, although relevant to Count I, is irrelevant for deciding the bail jumping charge and may have the effect of changing the jury's decision on willfulness from what it might otherwise have been.

It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime from which the jury may infer that the defendant committed the crime charged. Martin v. U.S., 75 U.S. App. D.C. 399, 401, 127 F2d 865, 867 (1942); Fairbanks v. U.S., 96 U.S. App. D.C. 345, 226 F2d 251 (1955). Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial legitimate purpose. Martin v. U.S., Supra; Boyer v. U.S., App. D.C. 397, 132 F2d 12 (1942). The same dangers appear to exist when two crimes are joined for trial, and the same protections are applicable.



Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, (5) the identity of the person charged with the commission of the crime on trial, and (6) in certain situations, prior convictions may be utilized for purposes of impeachment. 2 Wigmore, Evidence, Sections 300-371 (3 ed. 1940). When the evidence is relevant and important to one of these six issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value.

If, then, under the rules relating to other crimes, the evidence of each of the crimes on trial would be admissible in a separate trial for the other, it could be argued that the possibility of criminal propensity prejudice would not be enlarged by the fact of joinder.

Here it should be noted that it is questionable as to how much evidence of each crime would be admissible in a separate trial of the other crime. For example, there is the detailed testimony pertaining to the attempted acquisition of the gun. Very little of this testimony would be admissible in a separate bail jumping trial.

Secondly, the two pieces of evidence which the Government contends are relevant to both counts of the Indictment and, therefore, establish the grounds for joinder are, in fact, not very probative of, or important to the six issues enumerated above. These pieces of evidence are: (1) the defendant's flight and (2) her March 14, 1975, statement to Special Agent Peter L. Moyer. Since a person may flee for any number of innocent reasons, the probative value of flight evidence has been consistently doubted. Wong Sun v. U.S., 371 U.S. 471, 483, footnote 10, 83 S.Ct. 407, 9 LEd 2d 441 (1962); Miller v. U.S., 116 U.S. App. D.C. 45, 320 F2d 767 (1963); Alberty v. U.S., 162 U.S. 499, 511 16 S.Ct. 864, 40 LEd 1051 (1896); Vick v. U.S., 216 F2d 228, 233 (5th Cir 1954).

The March 14, 1975, statement adds nothing to the Government's case that could not be, and was, easily proven by other means.



In short, we argue that all the evidence of each crime would not be admissible in separate trials. And furthermore, that evidence which may be admissible in separate trials is not so probative as to outweigh the prejudice caused by joinder of offenses.

The Federal Courts have found no prejudicial effect from joinder when the evidence of each crime is simple and distinct. U.S. v. Lotsch, 102 F2d 35 (2d Cir) cert denied, 307 U.S. 622, 59 S.Ct. 793, 83 L.Ed. 1500 (1939); Langford v. U.S., 106 U.S. App D.C. 21, 268 F2d 896 (1959); Dunaway v. U.S., supra; Smith v. U.S., 357 F2d 486, 489 (1966). This rests upon the assumption that, with a proper charge, the jury can easily keep such evidence separate in their deliberations and, therefore, the danger of the jury's cumulating the evidence is substantially reduced. Judge Learned Hand, in the leading case of U.S. v. Lotsch at page 36 said:

There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition.

The case before the Court appears to be one in which the evidence is intertwined to such a degree that no amount of instruction to the jury can give a reasonable assurance that the jury will not cumulate the evidence. Not only may the jury find guilt on all counts where none would have been found at separate trials, but a legitimate finding of guilt (i.e. would have been found at a separate trial) on one count may be used to find guilt on the other count. So, for instance, where the jury found guilt on the gun purchasing charge, they may have felt the bail jumping a logical step in evading a jail term, hence, willful. Obviously, the finding of guilt on bail jumping has been done by considering more than the merits of the direct evidence. Such a misuse of evidence is particularly obnoxious in Ms. Brozyna's case because the first count of the Indictment was dismissed.



Without lengthly dissertation, it should be pointed out that a prejudice may arise in the jury from a latent hostility which is engendered by the fact that the defendant is charged with more than one crime. Although this effect is not calculable to any degree nor tangible, it appears to work most potently when one of the crimes is parole violation or bail jumping. Apparently, the public views such offenses as particularly abusive of a special privilege peculiar to democratic nations.

Finally, we must consider the unusual procedure of the case at bar. Herein, we refer to the fact that after the jury verdict the District Court dismissed Count I of the Indictment and denied the Government motion to amend. Why the Court waited to dismiss Count I is a matter of conjecture. The one thing of which we can be certain is that from the time of the first motion to dismiss Count I, prior to the trial, until the end of the trial, no new information relevant to the dismissal of Count I was brought forth. Thus, delay in dismissing the gun acquisition charge had the effect of convicting the defendant of bail jumping with the prejudicial evidence of Count I. This delay in dismissal needlessly caused the defendant to be confounded and embarrassed in her defense; allowed the jury to infer that Ms. Brozyna had a criminal disposition and allowed the jury to cumulate the evidence.

#### CONCLUSION

Defendant-Appellant has been denied her right to a fair trial. The Court should reverse the bail jumping conviction or in the alternative grant Ms. Brozyna a new trial.

Respectfully submitted,

McDONOUGH, BOASBERG, HAMSHER,  
HELLER AND RAMM  
EDWARD HELLER, OF COUNSEL  
Attorneys for Defendant-Appellant  
Office and P.O. Address  
930 Walbridge Building  
Buffalo, New York 14202

STEVEN ERRANTE, with him on the Brief



AFFIDAVIT OF SERVICE BY MAIL

RE: USA vs Lani M. Brozyna

State of New York )  
County of Genesee ) ss.:  
City of Batavia )

No. 77-1238

I, Leslie R. Johnson being  
duly sworn, say: I am over eighteen years of age  
and an employee of the Batavia Times Publishing  
Company, Batavia, New York.

On the 18th day of August, 19 77  
I mailed            copies of a printed Brief in  
the above case, in a sealed, postpaid wrapper, to:

10 copies (by Air Mail) to: A. Daniel Fusaro, Clerk  
U.S. Court of Appeals  
New Federal Court House  
Foley Square  
New York, New York 10007

2 copies to: Richard J. Arcara, U.S. Attorney  
502 U.S. Court House  
Buffalo, New York 14202  
Att: Edward J. Wagner, Esq.  
Assistant U.S. Attorney

at the First Class Post Office in Batavia, New  
York. The package was mailed Special Delivery at  
about 4:00 P.M. on said date at the request of:

McDonough, Boasberg, Hamsher, Heller & Ramm, Att: Edward Heller, Esq.

930 Walbridge Building, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

18th day of August, 19 77

Patricia A. Lacey

PATRICIA A. LACEY  
NOTARY PUBLIC, State of N.Y., Genesee County  
My Commission Expires March 30, 19 79



